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COUNSELORS AT LAW

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202-857-2946

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APR 26 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

AARON P. SHAINIS
202-857-2942

LEE J. PELTZMAN
202-857-2943

April 26, 1993

FACSIMILE
202-857-2900

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N. W.
Washington, D.C. 20554

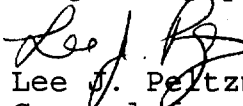
Re: MM Docket No. 93-41

Dear Ms. Searcy:

Transmitted herewith, on behalf of Triad Family Network, Inc., applicant in the above-referenced proceeding, are an original and six (6) copies of its Opposition to Petition to Dismiss Triad Application.

Should questions arise with respect to this filing, kindly communicate with the undersigned.

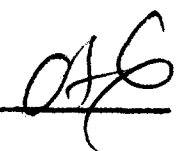
Very truly yours,


Lee J. Peltzman
Counsel for

TRIAD FAMILY NETWORK, INC.

Enclosure

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APR 26 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In re Applications of

TRIAD FAMILY NETWORK, INC.
Winston-Salem, North Carolina
Channel 207C3

POSITIVE ALTERNATIVE RADIO, INC.
Asheboro, North Carolina
Channel 207A

For Construction Permit for a
New Noncommercial Educational
FM Station

) MM No. 93-41

) BPED-910227MD

) BPED-911119MC

To: Administrative Law
Judge Joseph P. Gonzalez

OPPOSITION TO
PETITION TO DISMISS TRIAD APPLICATION

Lee J. Peltzman
Aaron P. Shainis
SHAINIS & PELTZMAN
Suite 500
1255 23rd Street, N. W.
Washington, D. C. 20037
202-857-2946

April 26, 1993

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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	MM No. 93-41
)	
TRIAD FAMILY NETWORK, INC.)	BPED-910227MD
Winston-Salem, North Carolina)	
Channel 207C3)	
)	
POSITIVE ALTERNATIVE RADIO, INC.)	BPED-911119MC
Asheboro, North Carolina)	
Channel 207A)	
)	
For Construction Permit for a)	
New Noncommercial Educational)	
FM Station)	

To: Administrative Law
Judge Joseph P. Gonzalez

**OPPOSITION TO
PETITION TO DISMISS TRIAD APPLICATION**

Triad Family Network, Inc. ("Triad"), by its attorneys, hereby submits its Opposition to the Petition to Dismiss Triad's application, filed herein by Positive Alternative Radio, Inc. ("Radio"), on April 6, 1993. In support of its position, Triad submits the following:

Radio seeks the outright dismissal of Triad's application because Triad did not engage in an act which virtually every FCC Administrative Law Judge has found to be nugatory. In that respect, Triad, on April 2, 1993, gave appropriate notice to the Presiding Officer and Radio concerning its understanding of the role of discovery in non-commercial educational comparative proceedings. Triad showed in its April 2 letter that its understanding -- that Section 1.325(c)(1) and (2) of the Commission's rules (the Standard Document Production Order and

Standardized Integration Statement) did not apply in non-commercial educational FM hearings -- was consistent with how the rule has been interpreted in prior non-commercial comparative proceedings by Presiding Judges. Triad stated further that, in a spirit of cooperation, its counsel would shortly thereafter be contacting Radio's counsel for the purpose of reaching an agreement as to a Joint Document Production Request and a mutually-convenient deposition schedule. See Attachment A.

Ignoring Triad's effort at cooperation, Radio instead served documents and a Standardized Integration Statement on Triad on April 5, 1993, then immediately filed a Motion to Dismiss the next day. Radio made no effort to reach either Triad or its counsel to discuss its interpretation of Section 1.325(c) of the rules.

Upon receipt of Radio's documents, Triad returned them to Radio by April 9, 1993, letter.^{1/} In that letter, counsel for Triad offered to meet with Radio's counsel for the purpose of exploring a Joint Motion for Production of Documents. See Attachment B. In response, Radio declined Triad's offer, instead maintaining that it was confident that the Presiding Officer would dismiss Triad's application. See Attachment C.

Radio's Petition to Dismiss is as lacking in substance as its actions are insulting to the spirit of fairmindedness which is intended to permeate Commission proceedings. Triad has sought

^{1/} The package containing the documents was opened by the receptionist at Triad's prior law firm. Undersigned counsel was not at work on the date that the package was received, but returned the documents when he became aware of their receipt.

repeatedly to cooperate with Radio by working out a Joint Motion for Production of Documents. Triad notified Radio of its intention prior to the date on which Radio exchanged documents. Yet, Radio's reply to Triad's offer of cooperation has been to seek Triad's dismissal.

Triad provided in its April 2, 1993, letter examples of Presiding Officers' rulings interpreting the Commission's discovery rules consistent with Triad's conclusion. Radio's present response is to attempt to distinguish and to otherwise attack those actions. Thus, for example, Radio maintains that Administrative Law Judge Steinberg's July 6, 1992, ruling in MM Docket 92-116 did not involve Section 307(b) of the Communications Act. Yet, the Standardized Document Production Order contains no reference to Section 307(b). Rather, it considers documents relating to the criteria of integration and diversification, matters which are relevant to comparative hearings involving commercial applications, but which are "meaningless" in non-commercial educational comparative proceedings. See Real Life Educational Foundation of Baton Rouge, Inc., 6 FCC Rcd 259, 260 and n. 6 (1991); Seattle Public Schools, 4 FCC Rcd 625, 643 (Rev. Bd. 1979); New York University, 10 RR 2d 215, 217 (1967), (diversification and other standard comparative criteria applicable to commercial comparative proceedings are "meaningless" in non-commercial educational comparative proceedings).

Radio additionally suggests that the Presiding Officer in MM Docket 91-157 did not conduct that proceeding in a manner

consistent with Triad's interpretation of Section 1.325(c). Radio is incorrect. Attached hereto is a transcript from the Prehearing Conference in MM Docket 91-157 in which the Presiding Officer discusses the subject of discovery but fails to take issue with the parties' earlier failure to exchange documents pursuant to the Standard Document Production Order. Instead, the Presiding Officer

Integration Statement are not applicable and will not be served by JMU. See 47 C.F.R. Section 1.325(c) (1991)." See Attachment H.

In fact, everyone seems to interpret Section 1.325(c) differently than Radio, which nevertheless maintains that the Administrative Law Judges at the Federal Communications Commission are all wrong and that they are incorrectly waiving a Commission rule. Initially, what is involved here is not a rule waiver, but a rule interpretation. The Commission's rules confer upon Administrative Law Judges plenary authority to regulate the course of comparative proceedings, including dealing with procedural matters. See Section 1.243 of the rules. See also Montgomery County Media Network, Inc. d/b/a Imagists, FCC 93-196, released April 21, 1993, at para. 13; Cuban-American Limited, 5 FCC Rcd 3781, 3782 (1990). FCC Administrative Law Judges have repeatedly

substantially complied with the Standard Document Production Order.^{2/} This is not a matter which in any way calls out for "the blunderbuss of disqualification." WADECO, Inc. v. FCC, 628 F.2d 122, 47 RR 2d 177, 186 (D.C. Cir. 1980) (Judge Mikva dissenting).

Radio's procedural game-playing should not be rewarded. Triad stands ready to engage in reasonable discussions to agree on a Joint Motion for Production of Documents. FCC authorizations should be awarded based on who is the best qualified applicant. Triad seeks the opportunity to proceed through a hearing so that it can make that showing. Accordingly, Radio's Petition to Dismiss should be denied.

Respectfully submitted,

TRIAD FAMILY NETWORK, INC.

SHAINIS & PELTZMAN
1255 23rd Street, N. W. #500
Washington, D. C. 20037
202-857-2946

By: Aaron P. Shainis (cgs)
Aaron P. Shainis
By: Lee J. Peltzman
Lee J. Peltzman
Its Attorneys

April 26, 1993

^{2/} Triad believes that its interpretation of Section 1.325(c) -- consistent as it is with the rulings of the Commission's Administrative Law Judges and with the actions of virtually all other non-commercial education applicants appearing before the Commission other than Radio -- is the correct one. However, should the Presiding Officer disagree, Triad will promptly provide whatever documents are in its possession which have not already been filed as part of its application or in subsequent pleadings, which are specified in the Standard Document Production Order. Triad believes that the more correct way to proceed would be for the parties to be directed to meet and agree on a Joint Motion for Production of Documents.

ATTACHMENT A

WBFJ Hearing
23490-007

'BARAFF, KOERNER, OLENDER & HOCHBERG

FILE COPY

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LEE J. PELTZMAN
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JAMES E. MEYERS**

April 2, 1993

**OF COUNSEL
ROBERT BENNETT LUBIC**

FAX: (202) 686-8282

RECEIVED

APR 2 1993

VIA HAND DELIVERY

**Honorable Joseph P. Gonzalez
Administrative Law Judge
Federal Communications Commission
2000 L Street, N.W., Room 221
Washington, D.C. 20554**

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

Re: MM Docket No. 93-41

Dear Judge Gonzalez:

This letter is being written on behalf of Triad Family Network, Inc. ("Triad"), applicant for a non-commercial educational FM station on Channel 207C3 at Winston-Salem, North Carolina. Both Triad and the other applicant in the above-referenced proceeding, Positive Alternative Radio, Inc. ("PARI") have filed Notices of Appearance in this case.

It is Triad's understanding that applicants need not comply with Sections 1.325(c)(1) and (2) of the Commission's rules relating to the Standard Document Production Order and Standardized Integration Statement because this case involves competing applications for non-commercial educational frequencies. The issues specified in this case differ considerably from those designated in cases involving applications for commercial facilities and, consequently, the standardized document production order and standardized integration statement have no applicability to this proceeding.

Triad's understanding is consistent both with how this matter was handled in MM Docket No. 91-157 before the Presiding Judge as well as in MM Docket No. 92-116 before Administrative Law Judge Arthur I. Steinberg. See Order Prior to Prehearing Conference, FCC 92M-754, released July 6, 1992, attached hereto.

Consistent with both of the above non-commercial educational FM comparative proceedings, counsel for Triad shortly will be contacting counsel for PARI for the purpose of exploring settlement and also reaching an agreement as to a Joint Document Production Request and a mutually-convenient schedule for the taking of

*(4/2/93) Letter to ALJ Gonzalez
re: Discovery*

BARAFF, KOERNER, OLENDER & HOCHBERG, P.C.

Honorable Joseph P. Gonzalez

April 2, 1993

Page 2

depositions, assuming that they are taken. Such a procedure should ensure uniform and reciprocal disclosure of documents as well as an orderly deposition schedule.

Very truly yours,



Lee J. Peltzman

Counsel for

TRIAD FAMILY NETWORK, INC.

LJP:bpt

Enclosure

cc: Julian Freret, Esq. (w/enclosure)

Norman Goldstein, Esq. (w/enclosure via Hand Delivery FCC)

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PCC 92N-754
03333

MM DOCKET NO. 92-116

File No. BRID-910130WF

**For Renewal of License
of Station WUCI-FM
Binghamton, New York**

and

- b. By July 31, 1992, counsel are directed to confer for the purpose of exploring settlement and possible agreement on share-time arrangements, the scope of the issues to be tried in this case, and discovery. With respect to discovery, if depositions are to be taken, the applicants shall agree on a mutually convenient schedule for the taking of such depositions. Interrogatories shall not be used and will not be entertained. Moreover, the applicants shall agree on a Joint Document Production Request which would be applicable to all applicants. This will ensure a uniform and reciprocal disclosure of documents. In the event one of the applicants has a specific document request relating to another, a separate request for the production of such documents shall be served in accordance with Section 1.325(a) of the Rules.
- c. By August 5, 1992, a Joint Report shall be submitted to the Presiding Judge fully reporting on the results of the meeting described above.

2. The November 2, 1992, hearing date is a firm date. Accordingly, the following procedural schedule is established:

October 2, 1992	Completion of all discovery.
October 9, 1992	Exchange of written direct cases. ¹
October 19, 1992	Notification of witnesses desired for cross-examination. ²

¹ All exhibits must be received by all parties not later than this date. The exhibits will be serially numbered, separately paginated, and assembled in a binder with a tab on each document. A prefix will be used to indicate the party sponsoring the exhibit. Each exhibit must be accompanied by the affidavit or declaration under penalty of perjury of a sponsoring witness. If official notice is requested of any materials in the Commission's files, that material should be assembled in written form, properly identified by source, given an exhibit number, and exchanged on the date set.

² Such notification may be made by phone or fax. If oral notification is given it must be confirmed in writing.

October 26, 1992

November 2, 1992

Objections to witness notification.

Commencement of the hearing at 10:00 a.m.
in the Commission's Washington, D.C.
offices.³

SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION

Arthur I. Steinberg

Arthur I. Steinberg
Administrative Law Judge

³ Rebuttal, if any, will commence immediately after the conclusion of the direct cases.

ATTACHMENT B

WBP / Baum
332800-7

P

BARAFF, KOERNER, OLENDER & HOCHBERG **FILE COPY**

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April 9, 1993

OF COUNSEL
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Julian P. Freret, Esq.

ATTACHMENT C

LAW OFFICES OF
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April 16, 1993

Lee Jay Peltzman, Esquire
Baraff Koerner Olender
& Hochberg, P.C.
5335 Wisconsin Avenue, N. W.
Washington, D. C. 20015-2003

In re: MM Docket No. 93-41

Dear Lee:

Since Triad Family Network has failed to comply with the requirements of §1.325 of the Commission's rules regarding exchange of documents and integration statement, and our client Positive Alternative Radio Inc. did in fact comply with applicable rules, I feel that any meeting with you for the further exchange of documents would not be a viable alternative to compliance with Commission regulations.

I anticipate that Judge Gonzales will, in conformity with the mandate of the rules,¹ dismiss the Triad application, which will terminate the proceeding and result in grant of the application of Positive Alternative Radio.

Yours very truly,


Julian P. Freret

JPF:mf

CC The Honorable Joseph P. Gonzales
Norman Goldstein, Esquire

¹ See footnote 3 to the Commission's Memorandum Opinion and Order, Gen. Doc. 90-264: "...failure to exchange any materials would constitute a failure to prosecute, resulting in the dismissal of an applicant. . .".

ATTACHMENT D

Def

Transcript of Proceedings

BEFORE THE

Federal Communications Commission

In the matter of:

Docket Number 91-157

NYACK, NEW YORK

DATE: August 22, 1991

VOLUME: 1

PLACE: Washington, D.C.

PAGES: 1 - 6

- - - - - X

In the matter of: :

NYACK, NEW YORK :

- - - - - X

APPEARANCES:

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WILLIAM E. KENNARD
Verner, Liipfert, Bernhard, McPherson & Hand
901 15th Street N.W.
Washington, D.C. 20005

1 APPEARANCES (Continued):

2 On behalf of Connecticut Public Broadcasting, Inc.:

3 STEVEN C. SCHAFFER

4 Schwartz, Woods & Miller

5 1350 Connecticut Avenue N.W.

6 Washington, D.C. 20036

7 On behalf of Sacred Heart University, Inc.:

8 NATHANIEL F. EMMONS

9 MARK N. LIPP

10 Mullin Rhyno Emmons & Toner

P R O C E E D I N G S

(Time Noted: 9:14 a.m.)

JUDGE GONZALEZ: All right, we will go on the record.

Today is August 22nd, 1991 and the time is 9:13 in the morning.

This is a prehearing conference regarding the matter of mutually exclusive applications of Sacred Heart University, Incorporated., Connecticut Public Broadcasting, Incorporated, Long Island University and State University of New York for a construction permit for a new non-commercial educational FM station and for modification of the facilities of Station WUSB-FM.

Would the parties please make their appearance at this time, beginning on my left?

MR. HUTTON: Thomas J. Hutton and Margaret L. Miller of Dow, Lohnes and Albertson for SUNY, Stony Brook.

MR. MILLER: Larry A. Miller and I'm sitting in for Robert Zauner this morning on behalf of the Chief, Mass Media Bureau.

MR. KENNARD: William Kennard, Verner, Liipfert, Bernhard, McPherson and Hand for Long Island University.

MR. SCHAFFER: Steven C. Schaffer, Schwartz,

1 Woods and Miller for Connecticut Public Broadcasting,
2 Inc.

3 MR. EMMONS: Nathaniel F. Emmons and Mark N.
4 Lipp for Sacred Heart University.

5 MR. SCHONMAN: Thank you.

6 Before going on the record, we discussed a
7 number of things.

8 One, I will require the filing of a joint
9 engineering exhibits in which all of the parties will
10 participate, which will address the 307(b) issue which
11 has been designated in this proceeding.

12 Also, the parties have indicated that they
13 see no reason for conducting depositions with respect
14 to that issue. However, they feel that depositions may
15 be required of any financial issues which remain in
16 this proceeding, any financial qualifications issues
17 which remain in this proceeding, as well as the non-
18 commercial comparative issue which has been designed in
19 this proceeding.

20 And we have agreed that the joint engineering
21 exhibit will be exchanged and, obviously, a copy filed
22 with the Bureau on December 20th, 1991.

23 We have also agreed that the date for
24 completion of all discovery will be December 20th,
25 1991.

1 The date each applicant will exchange
2 exhibits in support of their direct case in frozen
3 written form will be January 7th, 1992.

4 We will be holding an admission session on
5 January 21st, 1992, and we will also, at that time,
6 entertain a request that specific witnesses be
7 presented for cross examination.

8 So I would encourage the parties to come
9 prepared to make cogent argument as to why a particular
10 person should be presented.

11 The Commission's most recent pronouncement
12 with respect to procedures feels that cross examination
13 should be discourage, except in those cases where it is
14 absolutely essential, so we will entertain a request as
15 to who and hear argument, pro as well as con.

16 And the hearing will commence on February
17 3rd, 1992, at 10:00 a.m., in the offices of the
18 Commission in Washington, D.C.

19 As I mentioned, the parties will be prepared
20 to submit their direct case in frozen written form. If
21 official notice is requested of any materials contained
22 in the Commission's file, that material should be
23 assembled in written form, properly labeled as to
24 source and given an exhibit number.

25 Is there anything anyone would like to